Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Case No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRANDON PATRICK MICHAELS,
TERRI VOGEL MICHAELS,
Individually and as Next Friend of
CLARK JORDAN MICHAELS and
ALEXANDER MICHAELS,

Petitioners

vs

PRODIGY CHILD DEVELOPMENT
CENTERS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

DONN M. PEEVY
ATTORNEY FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Does the Fourteenth Amendment to the United States Constitution make the "non-delegation doctrine's" requisite establishment of sufficient guidelines applicable to the States, and if so, is Official Code of Georgia Annotated Section 49-5-41(c) violative of said doctrine?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Georgia.

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No textbooks cited

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No other authorities cited

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRANDON PATRICK MICHAELS,
TERRI VOGEL MICHAELS,
Individually and as Next
Friend of CLARK JORDAN
MICHAELS and ALEXANDER
MICHAELS,

Petitioners

vs

PRODIGY CHILD DEVELOPMENT
CENTERS, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Brandon Patrick Michaels, Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled case on October 4, 1993, rehearing denied on October 22, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, whose judgment is herein sought to be reviewed, is rendered in Case Number S93A0669, dated October 4, 1993 and the decision is unpublished. It is reprinted in the separate Appendix to this Petition, pp. A-1.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 4, 1993. Rehearing was denied on October 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution Art. I, Sec. VIII;

U.S. Constitution Art. II, Sec. II;

U.S. Constitution Art. II, Sec. III;

U.S. Constitution Fourteenth Amendment;

O.C.G.A. Section 19-7-5; and

O.C.G.A. Section 49-5-41.

STATEMENT OF THE CASE

The Petitioners, Brandon Patrick Michaels and Terri Vogel Michaels, are the natural parents of the named

minor children herein, Clark Jordan "C. J." Michaels and Alexander "Alex" Michaels.

The Respondent, Prodigy Child Care Centers, Inc., is a licensed child care facility.

Petitioners' minor children, C. J. age 4 and Alex age 2, were temporarily removed from the home and their parents' custody by Order of the Gwinnett Juvenile Court on April 23, 1990 pursuant to an Emergency Preliminary Deprivation hearing held following deprivation petitions filed on April 20, 1990, pursuant to a referral made to Department of Family and Children Services (DFCS) by Respondent (See Emergency Juvenile Hearing T. pp. 1902-1931; Deprivation petitions R. pp. 2136-2137).

Thereafter on or about May 2, 1990 an arrest warrant was issued for Petitioner/father, Brandon Patrick Michaels, on two counts of child molestation (R. pp. 2138-2140).

On August 2-3, 1990 a final deprivation hearing was held in Gwinnett Juvenile Court (See T.T. Vol. I, R. pp. 1057-1257; Vol. II, R. pp. 1258-1622). After hearing all the evidence the Court entered its final order finding "the children not to be at risk in the home", that the "children are not deprived," that the Court "does not find abuse by the father" and that "custody of said children is returned to the natural parents, and the temporary custody heretofore placed with the Gwinnett County Department of Family and Children

Services is hereby terminated." (See Final Order, R. pp. 2120-2121).

Though never indicted, the District Attorney dismissed the criminal charges against the Petitioner/father (R. pp. 2211-2212).

At the final deprivation trial in Juvenile Court and preliminary hearings thereto Petitioners learned that Respondent and Respondent's agents had committed breaches of contract with Petitioners while their children were enrolled in Respondent's child care center and committed fraudulent acts of misrepresentation as well, all of which form the basis of Petitioners' original complaint, Counts I, II and III for Breach of Contract and Counts IV and V for Fraud (See Summons and Complaint, R. pp. 7-20). Subsequently and pursuant to discovery, Petitioners learned that Respondent had made other fraudulent misrepresentations, violated the Unfair and Deceptive Business Act, committed perjury at said final deprivation trial in Juvenile Court and otherwise acted in bad faith and with malice against Petitioner, all of which form the basis of Petitioners' Amended Complaint, Count VII Unfair and Deceptive Business Act and Count VIII Malicious Prosecution (See Amended Complaint, R. pp. 2247-2281).

Respondent filed its Answer to Plaintiffs' original Complaint (R. pp. 24-34) and Amended Complaint (R. pp. 2362-2378) and raised as its defense the "immunity" of a mandated reporter as set forth in O.C.G.A. Section 19-7-5(2)(f).

METHOD OF PRESERVING FEDERAL QUESTION

As a part of its discovery Petitioners sought access to the files and records of the Department of Family and Children Services as it relates to the case of the Petitioners' children. When DFCS objected and refused, Petitioners filed their Motion to Compel Discovery which was denied by the trial court (R. pp. 1847-1849). In denying Petitioners' Motion to Compel Discovery and Petitioners' Motion for Reconsideration of same (R. p. 2643) the Court wrongly relied upon a statute (O.C.G.A. Section 49-5-51(c)) which violates the non-delegation doctrine; United States Constitution, Article I, Section 8; Article 2, Section 2; Article 2, Section 3 and the Fourteenth Amendment due process guarantees. These issues were raised in the trial court in a Motion to Compel, In-Camera Inspection and Motion for Reconsideration dated February 28, 1992 (See Appendix E).

Respondent thereafter filed its Motion for Summary Judgment on February 4, 1992 seeking judgment against Petitioners as a matter of law pursuant to the immunity provided under O.C.G.A. Section 19-7-5 and on the further grounds that Petitioners' civil action is against public policy (See Respondent's Motion and Brief, R. pp. 984-1010, 1011-1039).

Petitioners filed their Motion for Partial Summary Judgment and Response in Opposition to Respondent's Motion for Summary Judgment on March 4, 1992 (R. pp. 1884-1898, 1932-1998 with exhibits 2102-2213).

On November 30, 1992 the Honorable Fred Bishop granted Respondent's Motion for Summary Judgment without comment or citation (R. p. 2644) thereby terminating Petitioners' action and by implication denying Petitioners' Motion for Partial Summary Judgment.

Additionally, on November 30, 1992 the Court erred by entering an Order denying Petitioners' Motion for Reconsideration (R. pp. 2643; 35-38; 1847-1848, 1861-1883) of Petitioners' Motion to Compel the Production of Documents from the Department of Family and Children Services (DFCS). Documents which contain information as relates to the minor children herein (by and between Respondent and DFCS) and the underlying case in Juvenile Court. The Court in its Order based its ruling on O.C.G.A. Section 49-5-41 which is violative of the non-delegation doctrine and the Fourteenth Amendment of the United States Constitution.

Thereafter Petitioners appealed to the Supreme Court of Georgia which denied Petitioners without opinion under that Court's Rule 59 as well as refusing a reconsideration. Petitioners in their enumeration of errors and briefs on appeal argued the constitutionality of O.C.G.A. Section 49-5-41.

REASONS FOR GRANTING THE WRIT

The judgment of the Supreme Court of Georgia should be reviewed by this Court because this case concerns one of the most horrid charges any individual may be accused

under our law. The very nature of the charge alone is forever condemning, whether proven or not. The central figure in the process of investigating and compiling reports of child abuse in Georgia is the Department of Family and Children Services.[1] This administrative agency has been given absolute power in determining when and if these reports should be released to individuals similarly situated as Petitioners. There are no guidelines, procedures, criteria, not even an administrative process for which these records may be made available to such individuals.

Petitioners claim an interest in these reports. However, because of the statute at issue herein (O.C.G.A. Section 49-5-41(c)) they have been denied these reports and thereby aggrieved.

Petitioners are aware of no prior decisions addressing the questions presented here for review. Therefore important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court.

The opinion delivered in the trial court concerning the production of said reports provides:

> "The plaintiffs having filed their Request for Production of Documents upon the Gwinnett County Department of Family and Children Services, for the production of documents concerning the plaintiffs, and the respondent

---

[1]O.C.G.A. Section 19-7-5 is set forth fully in Appendix E.

> having filed an objection to said Request for Production of Documents, and all of said documents having been provided to the court for an in camera inspection, and the court having reviewed the records as provided by O.C.G.A. 49-5-41, and the court having determined that plaintiffs' access to said records is not necessary for the resolution for the issues in the above styled action and the records are not otherwise admissible under the rules of evidence, it is
>
> ORDERED that the objections of the Gwinnett County Department of Family and Children Services be sustained and the records requested by plaintiffs shall not be produced."

This ruling was entered after the parties agreed to allow the trial court to determine the issues raised in Petitioners' Motion to Compel via an in camera inspection. However, the court chose to ignore Paragraph 5 of said Motion to Compel which should have been ruled upon.

Thereafter, a Motion for Reconsideration was filed raising the same issues as in Paragraph 5 of the Motion to Compel.

The thrust of Petitioners' argument in paragraph 5 is that the State of Georgia has arbitrarily, capriciously and randomly denied access to their own records, pursuant to O.C.G.A. Section 49-5-41(c) which provides:

> "The department or a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department."

The question remains as to whether the Federal constitution prevents States from adhering to the requirements of the non-delegation doctrine which are applicable to the Federal government. Panama Refining Company, et al. vs. A.D. Ryan, et al., 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 447 (1935).

The Court stated in Michigan C.R. Co. vs. Powers, 201 U.S. 245, 26 S.Ct. 459, 50 L.Ed 744:

> "There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the state government, it would be void under the Federal constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress, and the Judiciary of separately the executive, legislative, and judicial powers of the nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal Constitution are invoked to restrain like action in a state. Crimes against the nation must be prosecuted by

> indictment, yet a state may proceed by information. Suppose a state by its Constitution grants legislative functions to the executive, or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process or equal protection?"

Petitioners concede the point that Georgia's legislature may delegate whatever functions it wishes to other branches or agencies. But, such delegation must be made with sufficient guidelines and measures which would prevent any arbitrary and random decision making process, rather than guarantee uniformity.[2]

Therefore, Petitioners argue that rooted within the "non-delegation doctrine" are the safeguards of due pro-

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[2]Panama Refining Company, et al. vs. A.D. Ryan, et al., 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 447 (1935).

J. W. Hampton, Jr. & Co. vs. United States (1928) 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. If the legislature lays down an intelligible principle to guide the agency, there is no unlawful delegation of legislative power.

People vs. Yonker (1932) 351 Ill. 139, 184 N.E. 228.

Wichita R. & Light Co. vs. Public Utilities Commission (1922) 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124.

cess and equal protection and this supposition is supported by both Panama, supra and this Court's recent decision of Mistretta vs. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 wherein it reiterated the rule,

> "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" Mistretta, Ibid at 372, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed 2d 714 quoting J. W. Hampton, Jr. & Co. vs. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed 624.

The safeguard requisites attached to the non-delegation doctrine should be applicable to the states through the Fourteenth Amendment to the United States Constitution.

This case is not much unlike those concerning zoning, issuance of permits or licenses or other cases wherein certain guidelines must exist prior to determination or disposition of particular cases. For instance, Hornsby vs. Allen, 326 F.2d 605 (1964), which dealt with due process in application for liquor license, states:

> " ..., the Supreme Court has held that the arbitrary refusal to grant a license or permit to one group when other groups have obtained permits under similar

> circumstances constitutes a denial of equal protection of the law." Ibid at 609.
>
> * * *
>
> "It is firmly established, ..., that the state has the right to regulate ... in the valid exercise of its police power, ..., but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled decision." Ibid at 609.

The Court in J. R. vs. Parham, 412 F.Supp. 112 (M.D. Ga. 1976), reversed on other grounds, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) also affirmed that the "Touchstone of due process is protection of individual against arbitrary action of government."

The decisions indicate that there is a nexus between the non-delegation doctrine's requirements, i.e., sufficient guidelines, and the guarantees of the Fourteenth Amendment.

This Court, to Petitioners' knowledge, has never analyzed these issues nor has any other Court and as a result, Petitioners have been aggrieved.

However, the question remains as to the repugnancy of O.C.G.A. Section 49-5-41(c) which states:

> "(c) The department or a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department." Ibid, (emphasis added).

Said statute goes on to list the persons or entities that may be entitled to such access but there exist no guidelines nor procedures for a determination. Neither are there any rules or regulations of that Department which address this issue.

In Mistretta, supra at footnote 7, this Court notes,

> "In Schechter and Panama Refining the Court concluded that Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." Ibid 373, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714
>
> "'Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice

> it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose ...'" Mistretta, supra quoting Yakus, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834, 28 Ohio Ops 220.

Neither Respondents, the lower courts nor this Court can state that O.C.G.A. Section 49-5-41(c) complies with the requirements of setting forth any guidelines, criteria or rules for which Department of Family and Children Services must use in its determination of accessibility.

For this reason Petitioners pray that this Court resolve these issues.

CONCLUSION

Wherefore, Petitioners prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Georgia in S93A0669 dated October 4, 1993, rehearing denied October 22, 1993. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed and that the cause be remanded.

Respectfully submitted.

DONN M. PEEVY
Attorney for Petitioners
State Bar No. 570650

572 Buford Drive
P. O. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

Dated: January 19th 1994

APPENDIX A

OPINIONS BELOW

In the Supreme Court of Georgia

Decided: OCT 04 1993

S93A0669. MICHAELS, et al. v. PRODIGY CHILD DEVELOPMENT CENTERS, INC.

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.

APPENDIX B

OTHER OPINIONS

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FILED IN OFFICE
CLERK SUPERIOR COURT
GWINNETT COUNTY, GA
92FEB 18 PM 4:56
GARY R. YATES, CLERK

BRANDON PATRICK MICHAELS,)
TERRI VOGEL MICHAELS,
Individually and as Next Friend)
of CLARK JORDAN MICHAELS and
ALEXANDER MICHAELS)

Plaintiffs) CIVIL ACTION FILE

vs.) NO. 91-A-02202-6

PRODIGY CHILD DEVELOPMENT)
CENTERS, INC.
)

Defendant
)

ORDER DENYING PRODUCTION OF DOCUMENTS BY GWINNETT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES

The plaintiffs having filed their Request for Production of Documents upon the Gwinnett County Department of Family and Children Services, for the production of documents concerning the plaintiffs, and the respondent having filed an objection to said Request for Production of Documents, and all of said documents having been provided to the court for an in camera inspections, and the court having reviewed the records

as provided by O.C.G.A. 49-5-41, and the court having determined that plaintiffs' access to said records is not necessary for the resolution for the issues in the above styled action and the records are not otherwise admissible under the rules of evidence, it is

ORDERED that the objections of the Gwinnett County Department of Family and Children Services be sustained and the records requested by plaintiffs shall not be produced.

IT IS SO ORDERED this 18th day of February, 1992.

/s/ Fred A. Bishop, Jr.

FRED A. BISHOP, JR., Judge
Superior Court of Gwinnett County

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	)	
Defendant.	)	

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiffs' "Motion for Reconsideration" having been presented to the court, and the court having reviewed the briefs of the parties, the pleadings, and all other matters of record, it is ORDERED that plaintiffs' "Motion For Reconsideration" is DENIED.

SO ORDERED this 30th day of November, 1992.

/s/ Fred A. Bishop, Jr.

FRED A. BISHOP, JR., Judge
Superior Court of Gwinnett County

B - 4

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	)	
Defendant.	)	

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

The defendant's motion for summary judgment having been presented to the court, and after consideration by the court of the pleadings, motion, response, supporting and opposing affidavits, briefs submitted by both parties, depositions, requests for admissions, and all other matters of record, and after consideration of the applicable and controlling law, the court finds that there are no disputes as to genuine issues of material fact and that summary judgment in favor of defendant as to all counts of plaintiff's complaint, as amended, is proper and is therefore GRANTED.

SO ORDERED this 30th day of November, 1992.

/s/ Fred A. Bishop, Jr.

FRED A. BISHOP, JR., Judge
Superior Court of Gwinnett County

APPENDIX C

ORDER ON REHEARING

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 22, 1993

The Honorable Supreme Court met pursuant to adjornment. The following order was passed:

Case No. S93A0669

BRANDON PATRICK MICHAELS ET AL. V. PRODIGY CHILD DEVELOPMENT CENTERS, INC.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

Donn M. Peevy
PEEVY & LANCASTER
P. O. Box 1264
Lawrenceville GA 30246

S93A0669

APPENDIX D

Judgment sought to be reviewed and its date of entry is not different from the date of the opinion or order required for Appendix A.

APPENDIX E

OTHER APPROPRIATE MATERIALS

IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Filed at 1:27 P.M.

FEB 20, 1991

GARY R. YATES
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	*	
Plaintiffs,	*	CIVIL ACTION
v.	*	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	*	
Defendant.	*	

MOTION FOR RECONSIDERATION

Now comes the Plaintiffs in the above-styled action and file this their Motion for Reconsideration wherein this Court is moved to reconsider it's ruling upon Plaintiffs' Motion to Compel Department of Family and Children Services to produce certain documents and an in-camera inspection by showing the Court the following:

1.

On or about July 16, 1991 Plaintiffs filed a Motion to Compel Department of Family and Children Services to produce certain documents (see Exhibit "A") after Department of Family and Children Services objected to Plaintiffs' Request for Production of Documents.

2.

On or about October 29, 1991 Plaintiffs and Department of Family and Children Services entered into a consent agreement for the Court to conduct an in-camera inspection (See Exhibit "B").

3.

This Court conducted said inspection and on February 18, 1992 issued an Order denying Plaintiffs' request for production of said documents (See Exhibit "C"), holding

> ". . . that Plaintiffs' access to said records is not necessary for the resolution for this issues in the above styled action and the records are not otherwise admissible under the rules of evidence. . ."

4.

Plaintiffs show that the only means provided under the law, as it applies to them, to obtain the documents sought is: (1) via a request to Department of Family and Children Services whom will accommodate such request when deemed appropriate by Department of Family and Children Services or (2) via an in-camera inspection.

5.

Plaintiffs show they have been aggrieved by both Department of Family and Children Services' denial to produce said documents and by this Court's denial.

6.

The provision under Official Code of Georgia Anno-

tated Section 49-5-41 Paragraph (c) which states:

> " The department of a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department:"

is a violation of the "separation of powers" clause of the Georgia Constitution Article I, Section II, Paragraph III and of the United States Constitution.

7.

The Court erred in determining that the documents sought are not necessary for the resolution of the issues in the instant case before it and are not otherwise admissible under the rules of evidence because said documents reflect the fraud, deceit and misrepresentation which make up the core of the Plaintiffs' complaint.

WHEREFORE, Plaintiffs pray that their Motion for Reconsideration be granted and that they be heard orally on a day certain regarding said motion.

Respectfully submitted this 28th day of February, 1992.

/s/ DONN M. PEEVY
Donn M. Peevy
Attorney for Plaintiffs
State Bar No. 570650

572 Buford Drive
P.O. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	*	
Plaintiffs,	*	CIVIL ACTION
v.	*	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	*	
Defendant.	*	

ORDER

The foregoing Motion for Reconsideration is read, considered and ordered filed. Let a copy of the same together with this Order be served upon the opposing counsel and let him show cause before this Court on the___ day of_____ , 1992 at _____ o'clock___ .m. why the prayers of the Plaintiffs' Motion should not be granted.

This___day of_____ , 1992.

_____

FRED A. BISHOP, JR., JUDGE
Gwinnett Superior Court

CERTIFICATE OF SERVICE

This to certify that I have served a copy of the foregoing Motion for Reconsideration upon the following parties:

Mr. Williston C. White
Fortson and White
Suite 300
3333 Peachtree Road, N.E.
Atlanta, Georgia 30326

Mr. William C. Joy
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

by placing the same in properly addressed, stamped envelopes and depositing in the United States Mail.

This 28th day of February, 1992.

/s/ DONN M. PEEVY
Donn M. Peevy

E - 6

IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Filed at 1:02 P.M.

JUL 16, 1991

GARY R. YATES
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	*	
Plaintiffs,	*	CIVIL ACTION
v.	*	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	*	
Defendant.	*	

MOTION TO COMPEL

Now comes the Plaintiffs, Brandon Patrick Michaels, Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels, in the above styled action and move this Court for an Order pursuant to Official Code of Georgia Annotated Section 9-11-37 and Rule 6.4 of the Georgia Uniform Superior Court Rules as follows:

1.

On or about June 4, 1991 Plaintiffs filed Requests for Production of Documents and served them upon Gwinnett County Department of Family and Children Services. A copy of Plaintiffs' Request for Production of Documents is attached hereto as Exhibit "A" and incorporated herein by reference.

2.

On or about June 10, 1991, 1991, the Division of Family and Children Services served its objection to Plaintiffs' Request for Production of Records is attached hereto as Exhibit "B" and incorporated herein by reference.

3.

Pursuant to the Uniform Superior Court Rules, Rule No. 6.4 Plaintiff attempted to resolve this conflict by its letter to Defendant dated June 26, 1991. A copy of said letter is attached hereto as Exhibit "C" and incorporated herein by reference.

4.

The Defendant replied to Plaintiffs' letter by correspondence dated July 3, 1991 still refusing to comply with Plaintiffs' request. A copy of said correspondence is attached hereto as Exhibit "D" and incorporated herein by reference.

5.

Plaintiffs show that Defendant's objections are without merit and the Request for Production of Documents should be compiled with for the following reasons:

(a) The federal law cited by Department of Family and Children Services does not cover nor govern the material requested.

(b) The Georgia statutes cited by Department of Family and Children Services does not precluded an individual from obtaining records concerning that individual.

(c) The Georgia statutes cited by Department of Family

and Children Services does not preclude production in cases where no criminal conduct took place.

(d) The Georgia statute cited by Department of Family and Children Services does provide in Official Code of Georgia Annotated Section 49-5-40(c) (4) for person's having legal custody, i.e. Brandon Patrick Michaels and Terri Vogel Michaels, of the child who is the subject of a report or record, i.e. Clark Jordan Michaels and Alexander Michaels to gain access to such records.

WHEREFORE, Plaintiffs pray:

(a) That an Order issue compelling Family and Children Services to respond to said items of discovery as above set out;

(b) That said Family and Children Services or its attorney by required to pay the reasonable expenses incurred in obtaining this order, including reasonable attorney's fees.

(c) For such other and further relief as the Court deems meet and proper in the premises.

/s/ DONN M. PEEVY

Donn M. Peevy
Attorney for Plaintiffs
State Bar No. 570650

572 Buford Drive
P.O. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Motion to compel upon the following parties:

Mr. Williston C. White
Fortson and White
Suite 300
3333 Peachtree Road, N.E.
Atlanta, Georgia 30326

Mr. William C. Joy
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

by placing the same in properly addressed, stamped envelopes and depositing in the United States Mail.

This 16th day of July, 1991.

/s/ DONN M. PEEVY
Donn M. Peevy

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IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Filed at 4:32 P.M.

JUN 4, 1991

GARY R. YATES
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	*	
Plaintiffs,	*	CIVIL ACTION
v.	*	FILE NO. 91-A-02202-5
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	*	
Defendant.	*	

REQUEST FOR PRODUCTION OF DOCUMENTS

To: GWINNETT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES
530 Northdale Road
Lawrenceville, Georgia 30245

COME NOW Brandon Patrick Michaels and Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels and serve upon you this Request for Production of Documents, pursuant to Official Code of Georgia Annotated Section 9-11-34(c).

YOU ARE HEREBY requested and required to produce copies of the documents designated below, which are in your possession, custody or control. You may do so by mailing copies of said documents to the undersigned at 572 Buford

Drive, P.O. Box 1264, Lawrenceville, Georgia 30246, within thirty (30) days after your receipt of this Request.

The requested documents are as follows:

1.

Copies of any and all documents, reports, statements or files concerning Clark Jordan Michaels, Alexander Michaels, Brandon Patrick Michaels and Terri Vogel Michaels, including any reports concerning the home evaluation of Barbara Negus.

This 30th day of May, 1991.

/s/ DONN M. PEEVY
Donn M. Peevy
Attorney for Plaintiffs
State Bar No. 570650

572 Buford Drive
P.O. Box 1264
Lawrenceville, Georgia 30246
(404) 963-0858

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Motion to compel upon the following parties:

Gwinnett County Department of
Family and Children Services
530 Northdale Road
Lawrenceville, Georgia 30245

Mr. Williston C. White
Fortson and White
Suite 300
3333 Peachtree Road, N.E.
Atlanta, Georgia 30326

by placing the same in properly addressed, stamped envelopes and depositing in the United States Mail.

This 30th day of July, 1991.

/s/ DONN M. PEEVY
Donn M. Peevy

IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. 91-A-02202-5
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	)	
Defendant.	)	

OBJECTION TO REQUEST FOR PRODUCTION OF RECORDS

COMES NOW the Division of Family and Children Services and files this objection to the Request for production of Documents in the above-styled case pursuant to O.C.G.A. 9-11-34(c) (1) upon the following grounds:

1. The requested records are confidential documents under the provision of 45 CFR 205.50;
2. The requested records are confidential documents under the provision of OCGA 49-5-40;
3. The requested records are confidential documents under the provision of OCGA 50-18-72 because they are specifically required by the federal government

to be kept confidential;

4. The requested records are confidential documents because their disclosure would be an invasion of personal privacy pursuant to OCGA 50-18-72.

At the very minimum, the above referenced code sections and regulations require an in camera inspection by the judge of a court of competent jurisdiction and issuance of an order upon a showing of good cause therefor.

Respectfully submitted this 10th day of June, 1991.

/s/ WILLIAM C. JOY BY LYNNDA L. JONES

William C. Joy
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3336
State Bar No. 405 500

CERTIFICATE OF SERVICE

Pursuant to OCGA § 9-11-34 (c) (2), the undersigned certifies that this day due and legal service has been made on counsel for the parties:

Donn M. Peevy
Attorney at Law
572 Buford Drive
Post Office Box 1264
Lawrenceville, Georgia 30246

in the foregoing matter by depositing a true and accurate copy of the Objection to Request for Production of Records in the United States mail in an envelope with adequate postage thereon or by hand delivery.

This 10th day of June, 1991.

/s/ WILLIAM C. JOY BY LYNNDA L. JONES
William C. Joy
Senior Assistant Attorney General

June 26, 1991

Mr. William C. Joy
Senior Assistant Attorney
General
132 State Judicial Building
Atlanta, Georgia 30334

RE: Brandon Patrick Michaels, Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels vs. Prodigy Child Development Centers, Inc. Civil Action File No. 91-A-02202-5

Dear Mr. Joy:

This letter is an effort on behalf of Plaintiffs to acquire your cooperation in providing the documents requested of which you have objected to in your pleadings sent to me dated June 10, 1991.

Your objections fail to set forth any legitimate reason to refuse such production. The "Request" do not seek any documents protected under Federal or State law. The codes you cite do not apply in a civil "breach of contract" and fraud case such as is the case at bar. Furthermore, O.C.G.A. § 49-5-40 provides for the confidentiality of records as relates to defined acts of "child abuse" and/or related abuses or molestation. As you will note, the child herein at issue was not found by the Gwinnett Juvenile Court to have been abused as defined and furthermore the criminal charges against said child's father have been discharged in favor of said father. No indictment has been returned, and the bond has been discharged and released by the District Attorney's office.

Furthermore even if the facts were to the contrary O.C.G.A. § 49-5-41(a) (2) provides a means for the production of same under the review of the Court "for determination of an issue before such court..."

Additionally your objection under O.C.G.A. § 15-18-72 is again without justification. Here there would be no " invasion of personal privacy" wherein the records sought are by, about and for the individual whom you suggest would be an invasion of their

own personal privacy!

Finally 45 CFR 205.50 is inapplicable as used in your objections. 45 CFR 205.50 does not in and of itself provide any legal restrictions or sanctions for the dissemination of defined information. 45 CFR 205.50 only sets forth an outline as to what the "state plan requirement" (emphasis added) should be if that state wishes to receive financial assistance under Title IV-A of the Social Security Act. It further directs that under § (a) (1) (i) that "The use of disclosure of information concerning applicants and recipients will be limited..." This paragraph is preceded by the mandate that it shall be controlled and enforced "Pursuant to state statute which imposes legal sanction."

Therefore, without question the "limits" and "sanctions" must be looked to in the state statutes cited in your objections (i.e. O.C.G.A. § 49-5-40 and 50-18-72), and in these sections the limits are defined with certain exceptions looked to by these Plaintiffs as set forth above.

Therefore, I will except such documents as requested to be supplied to my office within ten (10) days or I will have no alternative but to file a motion to compel and seek sanctions on behalf of Plaintiffs, if necessary.

Sincerely,
/s/ DONN M. PEEVY
Donn M. Peevy

DMP/ab

cc: Mr. Williston C. White

June 3, 1991

WRITER'S DIRECT DIAL
(404) 656-3336
FAX (404) 651-6459

Donn M. Peevy, Esq.
P.O. Box 1264
Lawrenceville, Georgia 30246-1264

RE: Brandon Patrick Michaels, Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels v.Prodigy Child Development Centers, Inc.; Civil Action File No. 91A-02202

Dear Mr. Peevy:

I have received your letter of June 26, 1991. This letter is to clarify the Department's position with respect to production of Department records regarding investigation conducted concerning allegations of abuse. Contrary to the contentions in your letter, both federal and Georgia statutes preclude the Department from releasing confidential records.

42 U.S.C. § 671(a) (8) requires that the State plan further limit disclosure of information concerning individuals assisted under the State plan. Additionally, pursuant to O.C.G.A. § 49-5-40, records concerning child abuse are confidential. That statute provides:

> Each and every record concerning reports of child abuse and child controlled substance or marijuana abuse which is in the custody of the department or other state or local agency is declared to be confidential, and access thereto is prohibited except as provided in Code § 49-5-41 and Code § 49-5-41.1.

Access to documents deemed confidential pursuant to O.C.G.A. § 49-5-40 may be release only as provided in O.C.G.A. § 49-5-41. The applicable subsection of § 49-5-41 provides for access to confidential records concerning child abuse only upon the Court's finding that access to such records is necessary for determination of an issue before the Court. O.C.G.A. § 49-5-41(a) (2). Moreover, the statute further provides that the Court "shall examine such records in camera." In inspecting the documents, the Court must determine before releasing confidential records that "public disclosure of the information contained therein is necessary for the resolution of an issue then before it and the record is otherwise admissible under the rules of evidence." Id. See Davidson v. State, 183 Ga. App. 557, cert. denied, 183 Ga. App. 905 (1987); Ray v. Department of Human Resources, 155 Ga. App. 81 (1980). It is the position of the Department of Human Resources that the Plaintiffs must show the Court that these confidential records are necessary for determination of an issue before the Court and that they are admissible under the rules of evidence. The confidentiality statute regarding reports of child abuse protects persons who inform the Department of Family and Children Services of child abuse and also protects the children who are victims of abuse.

For these reasons the Department of Human Resources is not authorized to release the requested documents to you. In fact, release of such documents to anyone not authorized to have access to the records pursuant to § 49-5-41 subjects the persons revealing the records to criminal penalty as provided in O.C.G.A. § 49-5-44.

For the foregoing reasons, the Department is unable to release the requested records absent the in camera inspection provided for in O.C.G.A. § 49-5-41(a) (2).

Sincerely,
/s/ WILLIAM C. JOY
William C. Joy
Senior Assistant Attorney General

WCJ/ljj

cc: Williston C. White, Esq.
Mr. Frederick C. Webb

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IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Filed at 2:33 P.M.

OCT 29, 1991

GARY R. YATES
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	*	
Plaintiffs,	*	CIVIL ACTION
v.	*	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	*	
Defendant.	*	

MOTION FOR IN CAMERA INSPECTION

NOW COMES the Plaintiffs in the above-styled action and files this Motion for In Camera Inspection pursuant to O.C.G.A. § 49-5-41(a) (2) and shows the Court the following:

1.

Plaintiffs and the Department of Family and Children Services have mutually agreed that the above-styled Motion is proper to determine the issues raised in Plaintiffs' Motion to Compel filed on or about July 16, 1991 against said Department of Family and Children Services.

WHEREFORE, Plaintiffs pray that this Motion be granted and that the Court conduct an in camera inspection of the materials requested.

This 29th day of October, 1991.

/s/ WAYNE LANCASTER FOR DONN PEEVY

IN THE SUPREME COURT OF GWINNETT COUNTY
STATE OF GEORGIA

Filed at 4:56 P.M.

FEB 18, 1991

GARY R. YATES
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BRANDON PATRICK MICHAELS, TERRI VOGEL MICHAELS, Individually and as Next Friend of CLARK JORDAN MICHAELS and ALEXANDER MICHAELS,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. 91-A-02202-6
PRODIGY CHILD DEVELOPMENT CENTERS, INC.	)	
Defendant.	)	

ORDER DENYING PRODUCTION OF DOCUMENTS BY GWINNETT COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES

The plaintiffs having filed their Request for Production of Documents upon the Gwinnett County Department of Family and Children Services, for the production of documents concerning the plaintiffs, and the respondent having filed an objection to said Request for Production of Documents, and all of said documents having been provided to the court for an in camera inspection, and the court having reviewed the records as provided by O.C.G.A. § 49-5-41, and the court having determined that plaintiffs' access to said records is not necessary for the resolution for the issues in the above-styled action and the records are not otherwise admissible under the rules of evi-

dence, it is

ORDERED that the objections of the Gwinnett County Department of Family and Children Services be sustained and the records requested by plaintiffs shall not be produced.

IT IS SO ORDERED this 18th day of February, 1992.

/s/ FRED A. BISHOP, JR.
Fred A. Bishop, Jr., Judge
Superior Court of Gwinnett County

19-7-5. Reporting of child abuse; when mandated or authorized; content of report; to whom made; immunity from liability; report based upon privileged communication; penalty for failure to report.

(a) The purpose of this Code section is to provide for the protection of children whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection. It is intended that the mandatory reporting of such cases will cause the protective services of the state to be brought to bear on the situation in an effort to prevent further abuses, to protect and enhance the welfare of these children, and to preserve family life wherever possible. This Code section shall be liberally construed so as to carry out the purposes thereof.

(b) As used in this Code section, the term:

(1) "Abused" means subjected to child abuse.

(2) "Child" means any person under 18 years of age.

(3) "Child abuse" means:

(A) Physical injury or death inflicted upon a child by a parent or caretaker thereof by other than accidental means; provided, however, physical forms of discipline may be used as long as there is no physical injury to the child;

(B) Neglect or exploitation of a child by a parent or caretaker thereof;

(C) Sexual assault of a child; or

(D) Sexual exploitation of a child.

(4) "Sexual exploitation" means conduct by a child's parent or caretaker who allows, permits, encourages, or requires that child to engage in:

(A) Prostitution, as defined in Code Section 16-6-9; or

(B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, as defined in Code Section 16-12-100.

(c) (1) The following persons having reasonable cause to believe that a child has been abused shall report or cause reports of that abuse to be made as provided in this Code section:

(A) Physicians licensed to practice medicine, interns, or residents;

(B) Hospital or medical personnel;

(C) Dentists;

(D) Licensed psychologists and persons participating in internships to obtain licensing pursuant to Chapter 39 of Title 43;

(E) Podiatrists;

(F) Registered professional nurses or licensed practical nurses licensed pursuant to Chapter 24 of Title 43;

(G) Professional counselors, social workers, or marriage and family therapists licensed pursuant to Chapter 10A of Title 43;

(H) Schoolteachers;

(I) School administrators;

(J) School guidance counselors, visiting teachers, school social workers, or school psychologists certified pursuant to Chapter 2 of Title 20;

(K) Child welfare agency personnel, as that agency is defined pursuant to Code Section 49-5-12;

(L) Child-counseling personnel;

(M) Child service organization personnel; or

(N) Law enforcement personnel.

(2) If a person is required to report abuse pursuant to this subsection because that person attends to a child pursuant to such person's duties as a member of the staff of a hospital, school, social agency, or similar facility, that person shall notify the person in charge of the facility, or the designated delegate thereof, and the person so notified shall report or cause a report to be made in accordance with this Code section. A staff member who makes a report to the person designated pursuant to this paragraph shall be deemed to have fully complied with this subsection.

(d) Any other person, other than one specified in subsection (c) of this Code section, who has reasonable cause to believe that a child is abused may report or cause reports to be made as provided in this Code section.

(e) An oral report shall be made as soon as possible by telephone or otherwise and followed by a report in writing, if requested, to a child welfare agency providing protective services, as designated by the Department of Human Resources, or, in the absence of such agency, to an appropriate police authority or district attorney. If a report of child abuse is made to the child welfare agency or independently discovered by the agency, and the agency has reasonable cause to believe such report is true, then the agency shall immediately notify the appropriate police authority or district attorney. Such reports shall contain the names and addresses of the child and his parents or caretakers, if known, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries, and any other information that the reporting person believes might be helpful in establishing the cause

of the injuries and the identity of the perpetrator. Photographs of the child's injuries to be used as documentation in support of allegations by hospital staff, physicians, law enforcement personnel, school officials, or staff of legally mandated public or private child protective agencies may be taken without the permission of the child's parent or guardian; provided, however, that any photograph taken pursuant to this Code section shall, if reasonably possible, be taken in a manner which shall not reveal the identity of the subject. Such photograph shall be made available as soon as possible to the chief welfare agency providing protective services and to the appropriate police authority.

(f) Any person or persons, partnership, firm, corporation, association, hospital, or other entity participating in the making of a report or causing a report to be made to a child welfare agency providing protective services or to an appropriate police authority pursuant to this Code section or any other law or participating in any judicial proceeding or any other proceeding resulting therefrom shall in so doing be immune from any civil or criminal liability that might otherwise be incurred or imposed, provided such participation pursuant to this Code section or any other law is made in good faith. Any person making a report, whether required by this Code section or not, shall be immune from liability as provided in this subsection.

(g) Suspected child abuse which is required to be reported by any person pursuant to this Code section shall be reported notwithstanding that the reasonable cause to believe such abuse has occurred or is occurring is based in whole or in part upon any communication to that person which is otherwise made privileged or confidential by law.

(h) Any person or official required by subsection (c) of this Code section to report a suspected case of child abuse who knowingly and willfully fails to do so shall be guilty of a misdemeanor. (Code 1933, § 74-111, enacted by Ga. L. 1965, p. 588, § 1; Ga. L. 1968, p. 1196, § 1; Ga. L. 1973, p. 309, § 1; Ga. L. 1974, p. 438, § 1; Ga. L. 1977, p. 242, §§ 1-3; Ga. L. 1978, p. 2059,

§§ 1, 2; Ga. L. 1980, p. 921, § 1; Ga. L. 1981, p. 1034, §§ 1-3; Ga. L. 1988, p. 1624, § 1; Ga. L. 1990, p. 1761, § 1.)

IN THE JUVENILE COURT OF GWINNETT COUNTY

STATE OF GEORGIA

AUG 10 1980 A.M.
TIME 11:40 P.M.
Clerk Juvenile Court
GWINNETT COUNTY, GEORGIA

IN THE INTEREST OF: *

CLARK JORDAN MICHAELS, * Docket Numbers: 90-1805
ALEXANDER MICHAELS, 90-1804
Minor children under *
the age of 18 years.

ORDER

The within and foregoing petition coming on to be heard for final hearing on August 2, 1990 and concluded on August 3, 1990, both petitioner and respondents being present and represented by legal counsel and a guardian ad litem being present representing the children, this Court having jurisdiction, said children being residents of this county, and after hearing evidence and argument and interviewing the child in chambers on August 8, 1990 by agreement of both parties and the guardian ad litem, the Court makes the following findings of fact and conclusions of law:

Said minor children were placed in the temporary custody of the Gwinnett County Department of Family and Children Services following a finding of deprivation at a preliminary hearing held on April 23, 1990, findings and recommendations made that date by the Referee (now Associated Judge) and confirmed by order dated April 30, 1990. Clark Jordan (C. J.) Michaels was placed in a foster home and Alexander

Michaels was placed with relatives in Dekalb County. The mother has been allowed and has exercised supervised visitation. No contact has been allowed between father and children.

First report of suspected abuse of C. J. was made in January 1990. The matter was investigated by DFCS but no action was taken and there was no communication with the parents. In April 1990 report of suspected abuse of C. J. was made to DFCS by the day care center where C. J. had been staying during the day. The Department then took the children into custody and filed a deprivation complaint in this Court.

At the present hearing there was a conflict in evidence as to sexual abuse by the father as alleged in the petition. A licensed psychologist who examined the child testified that she was "pretty sure" that C. J. had been sexually abused, and concluded that such abuse was at the hand of the father. A licensed psychiatrist who examined the father testified that "there is no indication that he is a danger to his child or any other child . . . and no evidence that he is a sexual deviant . . ."

A physical examination of the child (C. J.) at Egleston Hospital in April 1990 showed the child to be in good health with no physical evidence of molestation. The child has made no clear accusation of molestation by the father, according to testimony by the psychologist.

The Court does not find abuse by the father. However, it is obvious that the child has some behavior problems which need to be acknowledged and addressed Evidence showed that the older child (C. J.) has been aggressive, spitting and hitting; has made inappropriate sexual references and reference to body parts; has engaged in "excessive masturbation," often keeping his hands inside his pants. The child is presently confused by all the activity swirling around him.

The Court finds the children not to be a risk in the home, but that the parents are in need of some behavior management instruction and the entire family is in need of counseling.

The Court concludes that said children are not deprived as defined in OCGA 15-11-2(8).

IT IS THEREFORE ORDERED that custody of said children is returned to the natural parents, and the temporary custody heretofore placed with the Gwinnett County Department of Family and Children Services is hereby terminated.

IT IS FURTHER ORDERED that the family be involved in therapy with Dr. Edwin P. Hall, Jr., 1842 D Independence Square, Dunwoody Place North, Dunwoody Georgia 30338 or some other qualified licensed psychologist for the purpose of improving "behavior management" and for family counseling.

AND IT IS SO ORDERED this the 10 day of August, 1990.

/s/ Handsel Morgan

Handsel Morgan, Judge
Gwinnett County Juvenile Court

This is to certify that the within is a true and correct copy of Order as, the same appears of record in this office. Given that my official signature and seal of the Court the 10th day of Aug. 19 90.

/s/ Lynn Pass
Deputy Clerk
Gwinnett County Juvenile Court

S93A0669

SUPREME COURT OF GEORGIA

ATLANTA OCT 28 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BY: CLARKE, C.J.

The following direction was given:

BRANDON PATRICK MICHAELS et al. v. PRODIGY CHILD DEVELOPMENT CENTERS, INC.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on October 22, 1993, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme

Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Harold G. Clarke
Chief Justice Harold G. Clarke

49-5-41. Persons and agencies permitted access to records.

(a) Notwithstanding Code Section 49-5-40, the following persons or agencies shall have reasonable access to such records concerning reports of child abuse:

(1) A legally mandated, public or private child protective agency of this state or any other state bound by similar confidentiality provisions and requirements which is investigating a report of known or suspected child abuse or treating a child or family which is the subject of a report or record;

(2) A court, by subpoena, upon its finding that access to such records may be necessary for determination of an issue before such court; provided, however, that the court shall examine such record in camera, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then before it and the record is otherwise admissible under the rules of evidence;

(3) A grand jury by subpoena upon its determination that access to such records is necessary in the conduct of its official business;

(4) A district attorney of any judicial circuit in this state or any assistant district attorney who may seek such access in connection with official duty;

(5) Any adult who makes a report of suspected child abuse as required by Code Section 19-7-5, but such access shall include only notification regarding the child concerning whom the report was made, shall disclose only whether the investigation by the department or governmental child protective agency of the reported abuse is ongoing or completed and, if completed, whether child abuse was confirmed or unconfirmed, and shall only be disclosed if requested by the person making the report;

(6) Any adult requesting information regarding investigations by the department or a governmental child protective agency regarding a deceased child when such person specifies the identity of the child, but such access shall be limited to a disclosure regarding whether there is such an ongoing or completed investigation of such death and, if completed, whether child abuse was confirmed or unconfirmed; and

(7) The State Personnel Board, by administrative subpoena, upon a finding by a State Personnel Board administrative hearing officer that access to such records may be necessary for a determination of an issue involving departmental personnel, provided that only those part os the record relevant to the personnel action shall be disclosed. The name of any complainant or client shall not be identified nor entered into the record.

(b) (1) Nothwithstanding Code Section 49-5-40, the juvenile court in the county in which are located any department or county board records, concerning reports of child abuse, after application for inspection and a hearing on the issue, shall permit inspection of such records by or release of information from such records to individuals or entities who are engaged in legitimate research for educational, scientific, or public purposes and who comply with the provisions of this subsection. When those records are located in more than one county, the application may be made to the juvenile court of any one such county. A copy of any application authorized by this subsection shall be served on the nearest office of the department. In cases where the location of the records is unknown to the applicant, the application may be made to the Juvenile Court of Fulton County.

(2) The juvenile court to which an application is made pursuant to paragraph (1) of this subsection shall not grant the application unless:

(A) The application includes a description of the proposed research project, including a specific statement of the information required, the purpose for which the project requires that information, and a methodology to assure the information is not arbitrarily sought;

(b) The applicant carries the burden of showing the legitimacy of the research project; and

(C) The applicant agrees, and the court so orders the applicant, not to disclose:

(i) The name, address or other identifier of a child;

(ii) Information which would identify individuals who were investigated but not charged with or prosecuted for a crime or who were reporters of child abuse; or

(iii) Information which would prove personally embarrassing to individuals who were not targets of any investigation unless the juvenile court determines that exceptional interests militate in favor of disclosure

but any agreement order pursuant to this subparagraph shall not apply to information obtained from other than the records to which the applicant is afforded access under this subsection.

(3) If an applicant fails to conduct a research project in accordance with the research application submitted pursuant to this subsection or fails to comply with subparagraph (C) of paragraph (2) of this subsection, the court issuing the order under that paragraph (2) may terminate access, impose other restrictions, hold the applicant in contempt of court, or impose any combination of such sanctions.

(4) Notwithstanding the provisions of this subsection, access to the child abuse registry created pursuant to Ar-

ticle 8 of this chapter shall not be permitted except as allowed by Article 8 of this chapter.

(c) The department or a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department:

(1) A physician who has before him a child whom he reasonably suspects may be abused;

(2) Police or any other law enforcement agency of this state or any other state or any medical examiner or coroner investigating a report of known or suspected child abuse;

(3) A person legally authorized to place a child in protective custody when such person has before him a child he reasonably suspects may be abused and such person requires the information in the record or report in order to determine whether to place the child in protective custody;

(4) An agency or person having the legal custody, responsibility, or authorization to care for, treat, or supervise the child who is the subject of a report or record;

(5) An agency, facility, or person having responsibility or authorization to assist in making a judicial determination for the child who is the subject of the report or record of child abuse, including but not limited to members of officially recognized citizen review panels, court appointed guardians ad litem, certified Court Appointed Special Advocate (CSAS) volunteers who are appointed by a judge of a juvenile court to act as advocates for the best interest of a child in a juvenile proceeding, and members of a county child abuse protocol committee or task force;

(6) A legally mandated public child protective agency or law enforcement agency of another state bound by

similar confidentiality provisions and requirements when, during or following the department's investigation of a report of child abuse, the alleged abuser has left this state;

(7) A child welfare agency, as defined in Code Section 49-5-12, or a school where the department has investigated allegations of child abuse made against any employee of such agency or school and any child remains at risk from exposure to that employee;

(8) An employee of a school or employee of a child welfare agency, as defined in Code Section 49-5-12, against whom allegations of child abuse have been made, when the department has been unable to determine the extent of the employee's involvement in alleged child abuse against any child in the care of that school or agency. In those instances, upon receiving a request and signed release from the employee, the department may report its findings to the employer; and

(9) Any person who has an ongoing relationship with the child named in the record or report of child abuse any part of which is to be disclosed to such person but only if that person is required to report suspected abuse of that child pursuant to subsection (b) of Code Section 19-7-5, as that subsection existed on January 1, 1990. (Ga. L. 1975, p. 1135, § 2; Ga. L. 1990, p. 1778, § 2.)

Section 8.

[Powers of Congress]

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare Ware, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Executive the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 2.

[Powers of the President]

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases if Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Offices of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

[Powers and Duties of the President]

He shall from time to time give to Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

CONSTITUTION OF THE UNITED STATES

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Apportionment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a Sate, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

[Persons Disqualified from Holding Office]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4.

[What Public Debts are Valid]

The validity of the public debit of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[Power to Enforce This Article]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CERTIFICATE OF SERVICE

I, DONN M. PEEVY, a member of the Bar of the Supreme Court of the United States and counsel of record for Brandon Patrick Michaels, Terri Vogel Michaels, Individually and as Next Friend of Clark Jordan Michaels and Alexander Michaels, Petitioners herein, hereby certify that on the 19th day of January, 1994, pursuant to Rule 29, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Supreme Court on each of the parties herein, as follows:

On Prodigy Child Development Centers, Inc., Respondent herein, by depositing such copies in the United States Post Office or mail box, Atlanta, Georgia, with first class postage prepaid, properly addressed to the post office address of Mr. John A. Howard, the above-named Respondent's counsel of record, at White, Smith, Howard & Ajax, Attorneys at Law, 300 Atlanta Financial Center South, 3333 Peachtree Road, N. E., Atlanta, Georgia 30326.

On Michael Bowers, Attorney General for the State of Georgia in that 28 U.S.C. Section 2403(b) may be applicable, by depositing such copies in the United States Post Office or mail box, Atlanta, Georgia, with first class postage prepaid, properly addressed to the post office address of Mr. Michael Bowers, Attorney General for the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334.

All parties required to be served have been served.

This 19th day of January, 1994.

DONN M. PEEVY

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(2)

Case No. 93-1160

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRANDON PATRICK MICHAELS,
TERRI VOGEL MICHAELS,
Individually and as Next Friend of
CLARK JORDAN MICHAELS and
ALEXANDER MICHAELS,
Petitioners

vs

PRODIGY CHILD DEVELOPMENT
CENTERS, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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BRANDON PATRICK MICHAELS,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

Prodigy Child Development Centers, Inc., the respondent herein, respectfully prays that the Petition for Writ of Certiorari be denied.

I.

STATEMENT OF THE CASE

The Respondent, Prodigy Child Development Centers, Inc. ("Prodigy"), is a licensed daycare center as defined by O.C.G.A. § 49-5-12. Licensed daycare centers are statutorily required to report suspected child abuse to the Department of Family and Children Services (DFCS). *O.C.G.A. §19-7-5(c)(1)(K).* It is a criminal offense for mandated reporters to fail to report suspected child abuse. *O.C.G.A. § 19-7-5(h).* Furthermore, Georgia law not only deems all reports of suspected child abuse to be confidential and privileged for the protection of mandated reporters, but also ensures immunity from civil and criminal liability for all mandated reporters who report incidents of suspected child abuse in good faith. (*O.C.G.A. § §49-5-40(b) and 19-7-5(f)*).

The explanatory directives issued by the Georgia Council of Child Abuse instruct mandated reporters to report suspected child abuse whenever the mandated reporter has

"reasonable cause to believe that such abuse has occurred." These directives provide:

> The standard of 'reasonable cause to believe' that abuse has occurred implies the reporter is not to obtain proof abuse has occurred. Responsibility for investigating and proving abuse is with the Department of Family and Children Services or the criminal justice system, depending on the nature of the case. The child abuse report should be understood as a request for an investigation by DFCS. *(R. 997)*.

In compliance with O.C.G.A. § 19-7-5 and the Georgia Council of Child Abuse directives, Prodigy reported to DFCS that one of its students, Clark Jordan Michaels (C.J.), exhibited certain behavior which is symptomatic of child abuse. The Petitioners are the parents of C.J.

The Petitioners' statement of the case misrepresents and omits certain material facts. The Petitioners incorrectly suggest that the deprivation of their children was the result of some tortious act on the part of Prodigy. The Petitioners suggest that Prodigy was guilty of perjury, fraud, and breach

of contract, even though Prodigy denied all of these allegations and obtained summary judgment in the trial court. The Petitioners' statement of the case also fails to disclose that the Petitioner's experts admitted that the behavior which Prodigy reported to DFCS is symptomatic of child abuse. The Petitioners' experts further admitted that this behavior should have been reported to DFCS.[1]

Petitioners' statement of the case also fails to disclose that DFCS did not decide to temporarily remove C.J. and his brother from the home of Petitioners until after C.J. was no longer enrolled at Prodigy. Furthermore, Petitioners did not reveal to this Court that DFCS' decision was not based upon any report of suspected child abuse which was made by

---

[1] Barrie Alexander, the Petitioners' primary defense witness, admitted that Prodigy should have reported the behavior to DFCS and that the behavior should have been investigated by DFCS. *R-2588* (Alexander Depo. pp. 27, 28). Dr. James D. Larson, the Petitioners' other expert, admitted that DFCS should have investigated whether C.J. had been sexually abused by his father, based upon certain statements which C.J. made while enrolled at Children's World. *R-2586, 2587* (Larson Depo., pp. 26, 39, 40).

Prodigy. Rather, DFCS' decision was based upon statements made by C.J. to DFCS during an interview at Childrens' World, an unrelated daycare center. (*R-1351*, Juv. Ct. T., Vol II, p. 4). While he was enrolled at Childrens' World, C.J. reportedly told DFCS: . . . *daddy touches me on my penis* (*R-2603*, Magis. Ct. T. p. 11) . . . *daddy told me I couldn't tell anyone where he touched me.* (*R-2601*, Magis. Ct. T. p. 9).

On the day following the initial deprivation, DFCS interviewed C.J. at Children's World a second time. The investigating officer described the interview as follows:

> A: The next time we interviewed the child was the following day; we interviewed him at the children's shelter, and he described - - again, it was the same type of interview. He was real hesitant to talk about dad. He was afraid that dad was going to whip him. He cried about dad whipping him. He said dad gets real mad. And he continued to say that dad did touch him. In describing how dad touched him, he had a toothbrush, he put his hand on the toothbrush and went in an up and down motion. (indicating) (*R-2603*, Magis. Ct. T. p. 11).

The Petitioners further failed to disclose that Prodigy was not present at the interview which resulted in the deprivation, and that Prodigy was not involved in the DFCS decision to remove the children from Petitioners. Furthermore, Prodigy was not involved in the emergency preliminary deprivation hearing which resulted in the actual temporary removal of the children. (*R-902, 905, 906,* McHugh Depo., pp. 111, 114).

The record reveals that DFCS retained a qualified psychologist to evaluate C.J. after the initial deprivation. This psychologist conducted extensive testing and concluded that C.J. had been sexually abused by his father. Based upon the psychologist's report, DFCS decided that it was in the best interest of the children to proceed with the prosecution of the deprivation hearing. (*R-1064, 1066*, Juv. Ct., Vol. I, p. 8). At the hearing the psychologist related to the Court C.J.'s response to the question "What would you like to tell the Judge?" C.J.'s response was "my daddy did do it, but he

won't do it no more." (*R-1070*, Juv. Ct. T. Vol. I, p. 16). After this hearing, the charges against Mr. Michaels were dropped and the children were returned to their parents.

Subsequently, notwithstanding the confidentiality of the report and immunity afforded by O.C.G.A. § 49-5-12, the Petitioners individually, and as next friend of their children, filed the above-styled action against Prodigy, attempting to hold the Respondent liable for the acts of DFCS.

During the course of the litigation against Prodigy the Petitioners attempted, without success, to obtain confidential files maintained by DFCS. Prodigy did not oppose these efforts and had no interest in the decision of the trial court to deny Petitioners' access to these files. Pursuant to the Petitioners' request, the court conducted an *in camera* inspection of the DFCS files to ascertain whether any of the information in the files was relevant to the underlying lawsuit. As a result of this *in camera* inspection the trial court determined that the material contained in those confidential

files was not relevant to any issue before it. Ultimately, the trial court granted Prodigy's Motion for Summary Judgment.

There is no question that Prodigy is entitled to the immunity provided to mandated reporters under O.C.G.A. § 19-7-5(f). Prodigy was required, under penalty of law, to report C.J.'s behavior. Furthermore, Prodigy's report was obviously made in good faith, as evidenced by the admission of the Petitioners' expert that the reported behavior was symptomatic of child abuse. Moreover, DFCS decision to remove the children from Petitioners' home was based upon statements made by C.J. during an interview conducted at Children's World, an unrelated daycare center. Finally, the Motion for Summary Judgment was based upon other theories and evidence in the record, not the least of which included the fact there was no evidence to support an alleged breach of contract claim.

The Petitioners attack O.C.G.A. § 49-5-41(c) upon the theory that it violates Article I, Section VIII; Article II,

Section II; Article II, Section III, and the Fourteenth Amendment due process guarantees. The Petitioners' access to the DFCS files might arguably have been relevant in regard to the deprivation hearing which resulted in the return of the children to Petitioners. However, since the children were returned to their parents at the conclusion of the deprivation hearing, the issue of whether Petitioners should or should not have been given access to the DFCS confidential files is now moot. The trial court's decision to grant summary judgment to Prodigy was not dependent upon the contents of the DFCS's files, nor did the DFCS files have any relevance to the Petitioners' lawsuit against Prodigy. Therefore, the Petitioners' claim that a Georgia statute controlling access to DFCS files violates their right to due process in their lawsuit against Prodigy is clearly without merit.

II.

SUMMARY OF THE ARGUMENT

This Court should refuse to grant this Petition for Writ of Certiorari because Petitioners are now attempting to raise constitutional issues which were not raised and passed upon in the State Court. Therefore, Petitioners' claim was not preserved and is now too stale for consideration by this Court. Furthermore, pretermitting Petitioners' failure to preserve their claim, this Court should refuse to grant this Petition for Writ of Certiorari because Petitioners' claim lacks merit. Contrary to the Petitioners' claim, O.C.G.A. § 49-5-41 does not deny the Petitioners' constitutional guarantee of due process. Indeed, this Court held in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), that a substantially similar state statute comports with the principles of due process. Based upon the above, the Respondent respectfully requests this Court to deny this Petition for Writ of Certiorari.

III.

ARGUMENT AND CITATION OF AUTHORITY

A. Petitioners Did Not Preserve The Due Process Issues

Contrary to Petitioners' assertion on page 5 of their Petition for Writ of Certiorari, Petitioners did not raise any Fourteenth Amendment due process issues in the trial court. Indeed, neither the Motion to Compel nor the Motion for In Camera Inspection include any mention of constitutional issues. *See Appendices E-6 and E-22 of the Petition for Writ of Certiorari.* Furthermore, Plaintiff's Motion for Reconsideration in the Superior Court of Gwinnett County raised only a vague "separation of powers" issue under both the Georgia Constitution and the United States Constitution. *See Appendix E-1 of the Petition for Writ of Certiorari.* As stated by this Court:

> [A] vague appeal to constitutional principles does not preserve . . . due process claims. A party may not preserve a constitutional challenge by generally invoking the

> Constitution in the state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *C.f., Taylor v. Illinois*, 484 U.S. 400, 407, n. 9, 108 S.Ct. 648, 652, n. 9, 98 LED 2d 798 (1988) ("a generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . .").

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 77 (1988). This Court should refuse to grant this Petition for Writ of Certiorari because Petitioners' claim that O.C.G.A. § 49-5-41(c) denies Petitioners their constitutional guarantee of due process was not raised and passed upon in the state court. *Id.*

B. Petitioners' Claim Has No Merit

Petitioners claim that O.C.G.A. § 49-5-41 denies the Petitioners due process because it fails to set forth guidelines, criteria, or rules for disclosure of DFCS' confidential records lacks merit. In fact, this statute contains a procedure by which a court may obtain DFCS' records, and the Petitioners

availed themselves of that procedure. O.C.G.A. § 49-5-41(a)(2). (*See Appendix A-1*).

The records which the Petitioner sought in the trial court are confidential and access thereto is prohibited except as provided by statute. O.C.G.A. § 49-5-40 *et. seq.* The proper procedure for obtaining access to such records is to petition the trial court to subpoena the records and conduct an *in camera* inspection as to whether the records are necessary for determination of an issue before the court and are otherwise admissible under the rules of evidence. *O.C.G.A. § 49-5-41(a)(2)*; *Ray v. Dept. of Human Resources*, 155 Ga. App. 81 (270 S.E.2d 303) (1980). These statutory guidelines were followed in the present case. The Petitioners filed a motion encouraging the trial court to conduct an *in camera* inspection, and the trial court subsequently granted this request and performed the *in camera* inspection. *See Motion for In Camera Inspection (Appendix E-22 of the Petition for Writ of Certiorari.* Following its review of the DFCS

records, the trial court ruled that the DFCS records could not be produced because the plaintiffs' "access to said records is not necessary for the resolution for the issues in the above-styled action and the records are not otherwise admissible under the rules of evidence . . ." *Order Denying Production of Documents by Gwinnett County Department of Family and Children Services (Appendix E-24 of the Petition for Writ of Certiorari).* Thus, contrary to Petitioners' assertions, O.C.G.A. § 49-5-41 not only provides "guidelines, procedures, [and] criteria" by which the DFCS confidential records might have been obtained, the Petitioners also availed themselves of these procedures in the trial court.

Moreover, the procedures established by O.C.G.A. § 49-5-41 comport with the requirements of due process. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, this Court addressed the due process implications of a Pennsylvania statute which is substantially the same as

O.C.G.A. § 49-5-41[2]. Similar to the present case, the defendant in *Ritchie* had been charged with various sexual offenses against his minor daughter. The matter was referred to the Children and Youth Services (CYS), a protective service agency established by Pennsylvania to investigate cases of suspected child abuse. During pretrial discovery, the defendant served CYS with a subpoena seeking access to CYS' confidential records. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which mandates that all CYS records must be kept confidential, subject to specified exceptions. One of those specified exceptions allows CYS to disclose its confidential reports to a court of competent jurisdiction pursuant to a court order. *Id.* at 43-44. This Court held that the defendant's due process guarantees are fully protected by a statutory procedure requiring that confidential child abuse

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[2]All 50 states and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse. *Ritchie*, 480 U.S. at 60, n. 17.

files be submitted only to the trial court for *in camera* review. *Id.* at 60. In the present case, O.C.G.A. § 49-5-41(a)(2) provides for the *in camera* procedure approved by this Court, and the Petitioners availed themselves of this procedure. Thus, neither the Petitioners nor their attorneys in the present case have a constitutional right to conduct their own search of DFCS' files to determine the relevance of the contents of those files, and Petitioners have not been denied due process. *Id.* at 59.

Ritchie is not the only example of judicial approval of *in camera* inspection of privileged and confidential documents. It is well established that the *in camera* inspection procedure comports with the due process guarantees of the United States Constitution. *See U.S. v. Zolin*, 491 U.S. 566, 569 (1989) ("...this Court has approved the practice of requiring parties who seek to avoid the disclosure of documents to make the documents available for *in-camera* inspection..."); *In Re Grand Jury Matter of Catania*, 682 F.2d 61 (3rd Cir. 1982)

(given the secrecy attached to grand jury transcripts and FBI investigation materials, the district court's decision to exclude appellant and counsel from *in camera* examination of the materials comported with due process and was not in error); *United States v. Gallagher*, 576 F.2d 1028, 1040 (3rd Cir. 1978) (*in camera* questioning of witness in the absence of all attorneys was consistent with Jenck's Act and not in error); *Neustein v. Orbach*, 732 F. Supp. 333 (E.D.N.Y. 1990) (*in camera* interviews of children performed by family court did not deprive parents of due process). Furthermore, as explained by the United States Court of Appeals for the Second Circuit:

> While "[*i*]*n-camera* proceedings are extraordinary events in the constitutional framework" because they generally deprive one party to a proceeding a full opportunity to be heard on an issue, *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), they are by no means forbidden or without real usefulness in particularized circumstances. For example, they have been used to test claims of state secrets, *Halkin v. Helms*, 598 F.2d 1 (D.C.Cir. 1978); to excise material protected by privilege

> from that which is not, *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); to examine statements claimed to be irrelevant for purposes of the Jencks Act, 18 U.S.C. § 3500(b), *Palermo v. United States*, 360 U.S. 343, 354, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974); and to determine which of several instances of electronic surveillance might be challenged by a particular defendant, *Taglianetti v. United States*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969).

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982). Preserving the confidential and privileged nature of the child abuse reports in the present case serves no less useful a purpose than the examples cited above. As explained by this Court in *Ritchie*:

> To allow full disclosure . . . in this type of case would sacrifice unnecessarily the Commonwealths's compelling interest in protecting its child abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are

> no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth--like all other states--has made a commendable effort to assure victims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The commonwealth purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory evidence. Neither precedent nor common sense requires such a result.

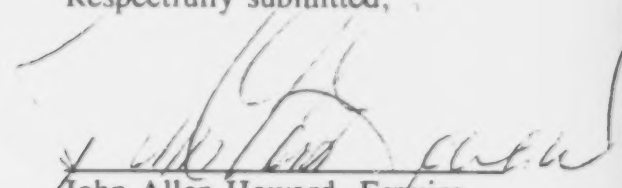
Ritchie, 480 U.S. at 60-61. Therefore, O.C.G.A. § 49-5-41 does not violate the Petitioners' constitutional guarantee of due process, and their claim to the contrary clearly lack merit.

IV.

CONCLUSION

WHEREFORE, Respondent respectfully requests this Court to deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

CODE OF GEORGIA
TITLE 49. SOCIAL SERVICES
CHAPTER 5. PROGRAMS AND PROTECTION FOR CHILDREN AND YOUTH
ARTICLE 2. CHILD ABUSE AND DEPRIVATION RECORDS

49-5-41 Persons and agencies permitted access to records.

(a) Notwithstanding Code Section 49-5-40, the following persons or agencies shall have reasonable access to such records concerning reports of child abuse:

(1) A legally mandated, public or private, child protective agency of this state or any other state bound by similar confidentiality provisions and requirements which is investigating a report of known or suspected child abuse or treating a child or family which is the subject of a report or record;

(2) A court, by subpoena, upon its finding that access to such records may be necessary for determination of an issue before such court; provided, however, that the court shall examine such record in camera, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then before it and the record is otherwise admissible under the rules of evidence;

(3) A grand jury by subpoena upon its determination that access to such records is necessary in the conduct of its official business;

(4) A district attorney of any judicial circuit in this state or any assistant district attorney who may seek such access in connection with official duty;

(5) Any adult who makes a report of suspected child abuse as required by Code Section 19-7-5, but such access shall include only notification regarding the child concerning whom the report was made, shall disclose only whether the investigation by the department or governmental child protective agency of the reported abuse is ongoing or completed and, if completed, whether child abuse was confirmed or unconfirmed, and shall only be disclosed if requested by the person making the report;

(6) Any adult requesting information regarding investigations by the department or a governmental child protective agency regarding a deceased child when such person specifies the identity of the child, but such access shall be limited to a disclosure regarding whether there is such an ongoing or completed investigation of such death and, if completed, whether child abuse was confirmed or unconfirmed; and

(7) The State Personnel Board, by administrative subpoena, upon a finding by a State Personnel Board administrative hearing officer that access to such records may be necessary for a determination of an issue involving departmental personnel and that issue involves the conduct of such personnel in child related employment activities, provided that only those parts of the record relevant to the child related employment activities shall be disclosed. The name of any complainant or client shall not be identified or entered into the record.

(b) (1) Notwithstanding Code Section 49-5-40, the juvenile court in the county in which are located any department or county board records concerning reports of child abuse, after application for inspection and a hearing on the issue, shall permit inspection of such records by or release of information from such records to individuals or entities who are engaged in legitimate research for educational, scientific, or public purposes and who comply with the provisions of this subsection. When those records are located in more than one county, the application may be made to the juvenile court of any one such county. A copy of any application authorized by this subsection shall be served on the nearest office of the department. In cases where the location of the records is unknown to the applicant, the application may be made to the Juvenile Court of Fulton County.

(2) The juvenile court to which an application is made pursuant to paragraph (1) of this subsection shall not grant the application unless:

(A) The application includes a description of the proposed research project, including a specific statement of the information required, the purpose for which the project requires that information, and a methodology to assure the information is not arbitrarily sought;

(B) The applicant carries the burden of showing the legitimacy of the research project; and

(C) Names and addresses of individuals, other than officials, employees, or agents of agencies receiving or investigating a report of abuse or treating a child or family which is the subject of

a report, shall be deleted from any information released pursuant to this subsection unless the court determines that having the names and addresses open for review is essential to the research and the child, through his or her representative, gives permission to release the information.

(3) Notwithstanding the provisions of this subsection, access to the child abuse registry created pursuant to Article 8 of this chapter shall not be permitted except as allowed by Article 8 of this chapter.

(c) The department or a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department:

(1) A physician who has before him a child whom he reasonably suspects may be abused;

(2) Police or any other law enforcement agency of this State or any other State or any medical examiner or coroner investigating a report of known or suspected child abuse;

(3) A person legally authorized to place a child in protective custody when such person has before him a child he reasonably suspects may be abused and such person requires the information in the record or report in order to determine whether to place the child in protective custody;

(4) An agency or person having the legal custody, responsibility, or authorization to care for, treat, or supervise the child who is the subject of a report or record;

(5) An agency, facility, or person having responsibility or authorization to assist in making a judicial determination for the child who is the subject of the report or record of child abuse, including but not limited to members of officially recognized citizen review panels, court appointed guardians ad litem, certified Court Appointed Special Advocate (CASA) volunteers who are appointed by a judge of a juvenile court to act as advocates for the best interest of a child in a juvenile proceeding, and members of a county child abuse protocol committee or task force;

(6) A legally mandated public child protective agency or law enforcement agency of another state bound by similar confidentiality provisions and requirements when, during or following the department's investigation of a report of child abuse, the alleged abuser has left this state;

(7) A child welfare agency, as defined in Code Section 49-5-12, or a school where the department has investigated allegations of child abuse made against any employee of such agency or school and any child remains at risk from exposure to that employee, except that such access or release shall protect the identity of:

(A) Any person reporting the child abuse; and

(B) Any other person whose life or safety has been determined by the department or agency likely

to be endangered if the identity were not so protected;

(8) An employee of a school or employee of a child welfare agency, as defined in Code Section 49-5-12, against whom allegations of child abuse have been made, when the department has been unable to determine the extent of the employee's involvement in alleged child abuse against any child in the care of that school or agency. In those instances, upon receiving a request and signed release from the employee, the department may report its findings to the employer, except that such access or release shall protect the identity of:

(A) Any person reporting the child abuse; and

(B) Any other person whose life or safety has been determined by the department or agency likely to be endangered if the identity were not so protected;

(9) Any person who has an ongoing relationship with the child named in the record or report of child abuse any part of which is to be disclosed to such person but only if that person is required to report suspected abuse of that child pursuant to subsection (b) of Code Section 19-7-5, as that subsection existed on January 1, 1990.

(Ga. L. 1975, p. 1135, § 2; Ga. L. 1990, p. 1778, § 2; Ga. L. 1991, p. 1320, §§ 1-3)